

# UKBA DECISION MAKING AUDIT

## ONE YEAR ON, STILL 'NO CREDIBILITY'

*Appeals successful...*

*Destitution not explained...*

*Evidence ignored...*

*Long delays...*

# About ASAP

ASAP is a small national charity specialising in asylum support law. Our aim is to prevent the destitution of asylum seekers by defending their legal entitlement to food and shelter. We do this by running a full-time duty scheme at the First Tier Tribunal (Asylum Support) in East London, which provides free legal advice and representation to destitute asylum seekers who have been refused housing and subsistence support or had support withdrawn.

We also run an advice line and training on asylum support law for advice workers and legal practitioners, and engage in policy, advocacy and litigation to influence and change policy and practice.

Set up in 2003, ASAP staff and pro bono legal advocates now assist about 600 asylum seekers at the Tribunal every year, significantly increasing their chances of securing support. An independent report by the Citizens Advice Bureau in 2009 concluded that ASAP representation increased asylum seekers' chances of a successful appeal outcome by 32%.<sup>1</sup>

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# ASAP

ASYLUM  
SUPPORT  
APPEALS  
PROJECT

## Asylum Support Appeals Project (ASAP)

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## NOTE:

This report was completed shortly before the Home Secretary announced that the UK Border Agency's functions have been recalled to the Home Office. Until any new structure or name is also announced forward-looking references to the UKBA should be read as 'UKBA/Home Office'.

<sup>1</sup> Supporting justice: the case for publicly-funded legal representation before the Asylum Support Tribunal (CAB, 2009)

## Executive summary

This report follows on from two previous reports produced by the Asylum Support Appeals Project (ASAP):

- ‘Not Destitute Enough: a report documenting UKBA’s failure to apply the correct legal definitions of destitution in asylum support decisions.’ (December 2008). This found that UK Border Agency (UKBA) decision making on asylum support was not based on the legal definition of destitution, which resulted in 70% of decisions being overturned on appeal.
- ‘No Credibility: UKBA decision making and Section 4 support’ (April 2011). This found that the UKBA’s decision making on destitution cases lacked credibility, with 82% of decisions on support applications based on destitution being overturned on appeal.

A year on, what progress has been made?

### Methodology

ASAP reviewed the case files of 20 appellants, who were all the clients we represented in the months of July 2011 and January 2012 who had been refused Section 95 or Section 4 support on the grounds of destitution. The appellants were based throughout the UK. Seventeen of the cases were refusals of entitlement to Section 4 and three were Section 95 appeals.

### Key findings on the quality of decision making on destitution

- There is still an unusually high success rate at the tribunal where the refusal is on grounds of destitution. Of the files surveyed **80% were overturned on appeal**. This represents a slight improvement on the rate in our ‘No Credibility Report’. It should be noted that in a further 15% of appeals the tribunal judge did not need to make a finding on destitution since the applicant was ineligible on another ground.
- The decision letters demonstrated that UKBA caseworkers are **still failing to apply the correct legal test** for destitution. Only one letter explained the destitution test correctly (a slight improvement on none in the last report); 10% attempted an explanation of the destitution test which was not correct; and 85% did not attempt to explain the test. Most letters simply concluded that the applicant was not destitute.
- Caseworkers are still not dealing with the evidence supplied in a satisfactory way. Only 20% of decision letters acknowledged the applicant’s circumstances and all the evidence they had supplied. In the remaining cases, the UKBA ignored all or some of the evidence supplied, instead stating that there was a lack of evidence to support destitution (while not acknowledging the evidence that had been provided) or focused on unconnected factors to assess and refuse the application. **In 45% of cases the decision letter did not take into account the evidence provided at all.**
- There were still **long delays in processing applications**. Fourteen applicants had to wait for more than two weeks for a decision, an increase on the previous report. Three had to wait over nine weeks. The longest delay was 4 months.

The UKBA has implemented some of ASAP’s recommendations in ‘No Credibility’. In particular, the guidance to the new combined ASF1 form is clearer about what evidence is required to prove destitution and the form now allows applicants space to give details of their circumstances and highlight any vulnerabilities. A deadline of five days (two days in priority cases) has also been introduced in response to the High Court’s ruling in *MK and AH [2012] EWHC 1896 (Admin)*. However, these changes have not led to a significant improvement in decision making:

- There is a big discrepancy between the evidence requested on the form and the evidence expected by UKBA decision makers. The guidance notes clearly state that applicants must supply information going back six months. All applications in the survey were completed in accordance to this guidance, but the rejection letters expected them to account for their whole time in the UK.
- The guidance notes to the form have not been updated to reflect the changes to the Section 4 policy instruction and still refer to the unlawful policy overturned in *MK and AH*.

### Case studies

- One applicant, who was a victim of torture and blind in one eye, waited about four months for a decision on his support application. His situation was precarious, staying in one room with a friend and his pregnant wife, without sufficient funds for his essential living needs. His appeal was allowed.
- Mr K submitted written evidence from social services that it would be discontinuing his support on a certain date because his age meant he was no longer entitled to leaving-care support. The UKBA refusal letter did not acknowledge this written evidence and instead stated that records showed he had alternative support available from social services, and therefore he was not destitute, despite the fact that this was clearly coming to an end within the specified time period. His appeal was allowed.
- Mr T submitted evidence from a friend who had previously supported him that was not considered or referred to in the refusal letter. Without applying the legal test for destitution the refusal stated that he “may be destitute” but concluded that he was not eligible for support because he had existing leave as a student that brought with it an entitlement to work. The tribunal judge allowed his appeal since he did not in fact have the right to work and existence leave is not a legal basis on which to refuse section 4 support.

### Key recommendations

- The UKBA should improve training for caseworkers so they understand and apply the legal test for destitution, assess applications for support in a way that is balanced and credible, and write clear, non-judgmental decision letters.
- Case owners should be instructed to take into account all evidence supplied with the ASF1 form.
- Standard form decision letters and guidance to case owners should be improved to reflect the problems highlighted in this report.
- All decision letters should set out how the welfare of dependent children has been safeguarded and promoted in the decision-making process.

# Legal dimensions in asylum support

## Legal dimensions in asylum support

To qualify for Section 4 support an applicant must demonstrate that they have been refused asylum, that they meet one of five narrow criteria on why it is unreasonable to expect them to leave the UK<sup>2</sup> and crucially, given the focus of this report, that they are destitute. To qualify for Section 95 support, an applicant must demonstrate that they are an asylum seeker<sup>3</sup> and again, that they are destitute. Dependants of both asylum seekers and failed asylum seekers can also qualify for support.

## The destitution test

The law on destitution is defined in the Immigration and Asylum Act 1999; Asylum Support Regulations, 2000; and Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005. The legal test for destitution comes from the 1999 Act and 2000 Regulations and the test applies to both Section 4 and Section 95 support. A person is destitute if at any point in the next 14 days:<sup>4</sup>

- (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
- (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.<sup>5</sup>

The test is clearly set out and sourced in two UKBA documents: ‘Assessing Destitution’<sup>6</sup> and ‘Section 4 Support Instructions’,<sup>7</sup> which are intended for caseworkers making decisions, and are applied by the Tribunal when assessing whether someone is destitute.

## Evidence to support applications

In support cases, the burden of proof is on the applicant, so evidence should be submitted with applications to prove destitution. Typically, this consists of personal statements or statements from family or friends outlining why they cannot help; bank statements or other financial information (if relevant); and letters from charities or other organisations that have assisted the applicant. The application form (ASF1) and attached guidance gives some indication of what evidence is required.

When someone has never been in receipt of asylum support

<sup>2</sup> To obtain Section 4 support, a person also has to meet one of the following criteria:

- They are taking all reasonable steps to leave the UK
- There is a medical reason why they can't travel back to their country of origin
- They have permission from the courts to pursue a judicial review of a Home Office decision relating to their asylum claim
- It would be a breach of their human rights not to provide them with support because they have a fresh asylum claim outstanding or are facing street homelessness, which would constitute inhumane or degrading treatment
- There is no viable route of return to their home country.

<sup>3</sup> Defined in s94(1) IAA as someone over 18 who has made a claim for asylum which has been recorded but not yet determined. Section 94(5) expands this definition so that where an asylum seeker's household includes a dependent child under 18, s/he continues to be an asylum seeker while the child remains under 18 and s/he and the child remain in the UK.

<sup>4</sup> Or 56 days if the person is already receiving support from the Home Office that is being terminated.

<sup>5</sup> Essential living needs include paying for food and basic toiletries etc.

<sup>6</sup> [www.tinyurl.com/c8ygu7d](http://www.tinyurl.com/c8ygu7d)

<sup>7</sup> [www.tinyurl.com/d9nvgz9](http://www.tinyurl.com/d9nvgz9) 8 p25, [www.tinyurl.com/d9nvgz9](http://www.tinyurl.com/d9nvgz9)

or has not been supported for a long time, they are expected to provide evidence to show why they now have no other means of support. The Section 4 Support Policy Instruction states:

*“If the applicant has been without asylum support for a prolonged period, it may be reasonable for Case Owners to consider that the applicant has had access to an alternative source of support, and may continue to do so, unless a good explanation is provided as to why this support can no longer be provided.”*

The ‘Assessing Destitution’ policy instruction reiterates this. But the application form and guidance notes state that evidence should be supplied for the previous six months. This inconsistency, it appears, continues to mean that applicants are unsure what time span they have to cover with evidence and leads to unnecessary refusals.

## Vulnerability

Section 18 of the new ASF1 application form allows caseworkers to identify vulnerable applicants. It asks appellants to highlight “if there are any other reasons why we should prioritise your application”. There are tick boxes for: pregnant; mental health problems; serious physical health problems; victim of domestic violence; age dispute; potential victim of trafficking. This is a significant improvement on the previous form. In addition, the front page asks if they are going to be made street-homeless tonight and there are parts of the form for giving details of dependants. These questions are intended to allow the UKBA to decide on the urgency of the application. But there is no clear policy on how this information is used to prioritise applications.

## Deadline for deciding applications

A deadline of five days (two days in priority cases) for making a decision on some Section 4 applications has been introduced in response to the High Court's ruling in *MK and AH [2012] EWHC 1896 (Admin)*. These deadlines apply when someone has made further submissions to the UKBA. Whether a case is considered a priority depends on case facts. But the UKBA has listed street homeless people, families with children, disabled or elderly people, pregnant women, survivors of torture, rape and other forms of violence and potential trafficking victims as priority groups. There are no other specified deadlines for other types of applications.

## Balance of probabilities

UKBA caseworkers assessing applications must consider whether they believe the information supplied on the balance of probabilities. In other words, do they think the applicant's case is more likely to be true than not? This standard of proof means that it is possible for a caseworker to doubt some aspects of the application but still grant support on the basis that the applicant meets the destitution test.

# Appellants’ circumstances

The case files included information on an applicant’s personal profile, asylum history, how they survived without UKBA support and, notably, their vulnerability.

## Nationality

The top five nationalities of applicants were Iran (15%), and 10% each from Palestine, Democratic Republic of Congo, Eritrea and Pakistan; 45% originated from African countries, 30% were Middle Eastern and the rest were split between South Asia and Central Asia.

## Age

Most applicants were in their mid-20s to mid-40s, with very little variation from our previous 2011 ‘No Credibility’ report; 30% were between 25 and 34 and another 30% were between 35 and 44. Another quarter of cases were under 24 years of age. The youngest was 19 and the oldest 55.

## Gender

The gender figures were in keeping with our UK-wide statistics; about a third of applicants were women (35%) and two thirds men (65%). Women were, however, more vulnerable than men with three being single with children (whereas no men were taking care of dependants alone), and overall five were single and one lived separately from her family.

## Families and children

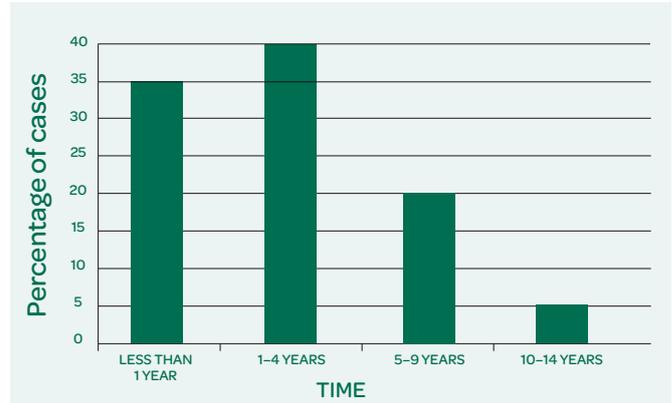
Thirteen children were included as dependants on the applications considered.<sup>9</sup> Forty per cent of applicants had a family with children, but due to the pressures of destitution and structure of support a quarter were living apart from their family. Applicants are often willing to separate from their families to access Section 4 support and avoid destitution.

**Case example: Mrs H and her young baby had been staying with her husband who had leave to remain in the UK, in breach of his tenancy agreement. He had been supporting the family on around £40 a week, which was unsustainable so the family were forced to separate.**

## English language proficiency

Twelve applicants had a working knowledge of English.<sup>10</sup> Despite this, 95% of appellants required an interpreter during the hearing.

## Number of years claiming asylum



The largest proportion of applicants had claimed asylum between one and four years prior to their asylum support application. A significantly larger number applied for support within a year of their claiming asylum than was the case when our ‘No Credibility’ report was published.<sup>11</sup>

## Months without formal support



The majority of applicants had spent under six months without formal support.<sup>12</sup> Of these, two cases were still in initial accommodation or housed by social services, the rest had either recently exhausted their appeal rights applying for Section 4 after their Section 95 was terminated, or when appealing discontinuation of support. This suggests that even when applicants do not have to prove how they have been supporting themselves for long periods, support is still refused on destitution grounds.<sup>13</sup>

Nearly a third of those who were without support for less than six months spent at least some time sleeping rough. Applicants who survive without support do so thanks to informal networks of friends and family. In the current sample of cases, charity also played a big role with at least a quarter partly relying on charity. Receiving informal assistance is hard as friends and family are often living on low incomes themselves, leading people to live in unsuitable and unsustainable circumstances.

**Case example: Mr S is a student from Palestine who claimed asylum after a change of circumstance. On claiming asylum he was barred from working and for a short period was supported by a friend. When his friend asked him to leave he had nowhere to go and became street homeless.**

<sup>11</sup> Based on 18 cases, as two applicants had never applied for asylum.

<sup>12</sup> Formal support is asylum support or social services support. It is measured since the date of asylum claim – cases that did not have an asylum claim are excluded.

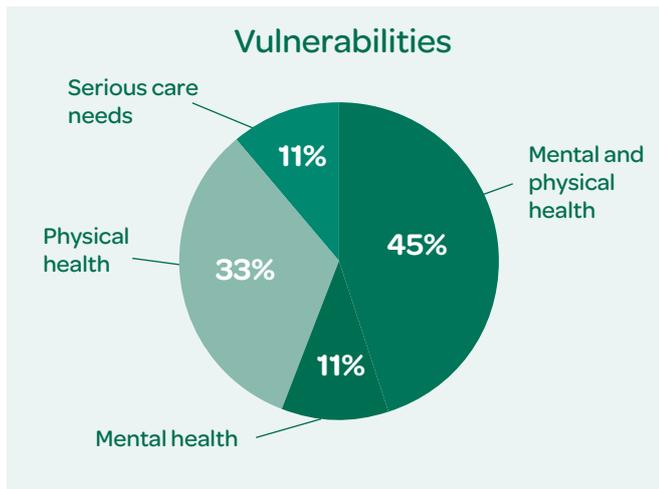
<sup>13</sup> ASAP No Credibility: UKBA decision making and Section 4 support (April 2011) p4: “Section 4 guidance explains that where an individual has not had support for a long period of time, then it would be reasonable for the caseworker to conclude that the person has access to alternative sources of support.”

<sup>9</sup> In total the families we looked at included 16 children. Those that were not included as dependants were supported separately from the applicant.

<sup>10</sup> This meant that we were able to advise and prepare their cases without the use of interpreters.

## Vulnerability

Applicants continue to have significant vulnerabilities, such as health problems, being a single parent or as victims of domestic violence. Women especially are significantly more likely to be single parents or victims of domestic violence. In this sample 45% had health problems and a significant minority had a combination of health problems. This level of vulnerability is higher than the average measured by ASAP, where only 28% have multiple health problems. This is important, since destitution can lead to serious deterioration of both physical and mental health.



**Case example:** Mrs G was a victim of domestic violence and suffered from serious mental health problems, which had previously led to suicide attempts. She was relying on the kindness of a friend to avoid destitution, but he could no longer provide support.

**Case example:** Ms E applied for support when her baby was four days old and in neonatal intensive care, having been diagnosed with a life-threatening infection. Until she gave birth she was accommodated by her sister but had to move out once her baby was discharged from hospital.

## Reasons for applying for support

Applicants applied for asylum support as a last resort to avoid destitution in situations where support networks were unavailable to them or had collapsed. In our sample a larger proportion had made an asylum claim recently than in the ‘No Credibility’ report and so were less likely to have established support networks.

### Change in applicants’ circumstances

A common cause for seeking support is a change of circumstances; 10% of applicants were women who recently gave birth, making their previous support arrangements unsustainable. Pregnant women are particularly vulnerable to losing access to support networks, and make up only 3% of ASAP’s clients. A change in immigration status is also a massive change of circumstance that can force people into destitution.

**Case example:** Mr A and his wife had seven children, six of whom were minors. Mr A was supported by the Libyan government as a student. He claimed asylum after the situation in Libya changed. The couple borrowed and spent all their savings, but without permission to work they struggled to even provide sufficient food for their children.

### Friends or family unable to cope any longer

In half of cases<sup>14</sup> a person applied for support because their friends could no longer support them. In 40% of these cases the applicant had been directly asked by their friend to leave. In the other cases support by friends or family was simply unsustainable, leaving the applicant with little choice.

**Case examples:** Mr L was housed by a friend who could no longer support him. He had to leave and spent time sleeping rough. ■ Ms R was a victim of domestic violence and suffered from serious mental health problems, which had led to suicide attempts. Her friend housed and helped her after her asylum was refused, but could no longer continue providing support.

### No change in circumstances

In a quarter of cases there was no change in circumstances. These were applicants that were transitioning from one form of support to another or were appealing decisions to discontinue. There is a 21 day grace period for those who are on Section 95 to apply for Section 4 after losing their asylum appeal. All clients in the current selection took longer to apply, or were transitioning from social services to Section 4.

**Case examples:** Mr B was 20 years old and his social services support under the Children’s Act from the leaving-care team was due to end imminently so he applied for Section 4 support. ■ Mr M had his Section 4 support discontinued because he had visited his wife and child, who also had just erroneously had their Section 95 support discontinued.

<sup>14</sup> It is not always possible to determine exact reasons. Cases counted here are ones where an applicant had been asked to leave by their friend/family without any change in the applicant’s circumstances, or where the applicant has applied for support due to living in unsustainable conditions with friends/family.

## The applications

As part of the application for support, destitute asylum seekers are required to submit evidence to prove that they are destitute and, in the case of Section 4, that they also meet at least one of the criteria. Specifically proving destitution is not straightforward and evidence can be hard to collect. Documents can be lost, or letters of support may be impossible to obtain. But 85% of our cases included evidence stating their destitution.

### Evidence provided

Three-quarters of applicants provided evidence regarding their current circumstances and proof of destitution.<sup>15</sup> In over half of these cases, the evidence provided contained letters from an authoritative organisation<sup>16</sup> explaining in detail the applicant's circumstances and reasons for needing support. A further 10% had provided limited evidence. One had submitted destitution evidence but had insufficient evidence to meet the other grounds for Section 4. The other applicant was a victim of domestic violence and had serious mental health problems, which had previously led to suicide attempts. Despite this, the applicant had supplied a long witness statement within the space provided in the ASF1 form. Only one appellant did not provide any evidence.

### Evidence taken into account

In only 20% of applications was evidence taken fully into account. In another four only parts of the evidence were taken into account and in 45% of cases evidence was not taken into account at all.

Where evidence was partially considered, the decision maker referred to evidence selectively and completely ignored key pieces of evidence. In one decision, part of the evidence provided was not assessed properly and a key letter from a reputable advice agency explaining fully and in detail the applicant's circumstances was not even referred to. In two cases, evidence within the ASF1 form was not considered, even though the form is designed for an applicant to present their current circumstances in detail.

Further information was requested in only three cases, and even then there was failure to take the evidence provided into account. Given the high number of refusals for lack of evidence and the cost of appeals, requests for further information do have the potential to be beneficial for appellants and UKBA caseworkers. It is essential, however, that this further information is genuinely required for a proper assessment and does not cause undue delay to vulnerable appellants. Anecdotal evidence suggests that there have been problems in some cases where further information is requested unnecessarily and support is being delayed further.

**Case example: Mr E was accepted as destitute by the UKBA and then two weeks later his evidence regarding destitution was rejected on the basis that his account could not be accepted without independent verification that he was street homeless.**

## UKBA decision making

All the applications were refused or support discontinued<sup>17</sup> because the UKBA decided that the applicant was not destitute.<sup>18</sup> In four cases the UKBA requested more information, which was supplied by all but one applicant. In three cases this request was before making a decision; in one case the request was sent after the refusal had been served.

We studied decision letters to scrutinise whether UKBA caseworkers applied the legal destitution test, how they treated evidence and the reasons given for refusing support.

### The destitution test

The decision letters demonstrated that UKBA caseworkers either did not understand or did not apply the legal destitution test. One letter explained the destitution test correctly; 10% attempted an explanation of the destitution test that was not correct; 85% did not attempt to explain the test. Most letters simply concluded that the applicant was not destitute.

Sometimes the caseworker partially understood the test, stating for example that the person was not considered destitute because they had funds for accommodation, without considering 'adequacy' of accommodation; and one stated the test but omitted the important time scale element, 'within 14 days'. A number of letters simply stated that the applicant was not entitled to support.

The figures show a small improvement since our 'No Credibility' report, when not one letter explained the test correctly. However, most decisions were still wholly inadequate in setting out and applying the correct law.

### Treatment of evidence

Caseworkers failed to deal with the evidence supplied in a satisfactory way. Only 20% of decision letters acknowledged the applicant's circumstances and all the evidence they had supplied. The letter then explained why the evidence was not accepted. In the remaining 80% of cases, the UKBA ignored all or some of the evidence supplied, instead stating that there was a lack of evidence to support destitution (while not acknowledging the evidence that had been provided) or focused on unconnected factors to assess and refuse the application. In 45% of cases, the decision letter did not take into account the evidence provided at all.

**Case example: Mr K submitted written evidence from social services that it would be discontinuing his support on a certain date because his age meant he was no longer entitled to leaving-care support. The UKBA did not acknowledge this written evidence and instead stated that its records showed he had alternative support available from social services, and therefore he was not destitute, despite the fact that this was clearly coming to an end within the specified time period. His appeal was allowed.**

<sup>15</sup> Two cases had incomplete or missing bundles making it impossible to review what evidence was submitted.

<sup>16</sup> This included refugee organisations, homeless charities, solicitors and social workers.

<sup>17</sup> One case was discontinued.

<sup>18</sup> Over half of applications were also turned down on the grounds that the applicant did not meet other criteria for Section 4 or Section 95 support.

**Case example:** Mr T submitted evidence from a friend who had previously supported him that was not considered or referred to by the UKBA in its refusal letter. Without applying the legal test for destitution the refusal stated that he “may be destitute” but concluded that he was not eligible for support because he had existing leave as a student that brought with it an entitlement to work. The tribunal judge allowed his appeal since he did not in fact have the right to work and existing leave is not a legal basis on which to refuse Section 4 support.

## Reasons given for refusal

The decision letters were not always clear as to the reason support was being refused but some common trends did emerge when analysing decision letters.

**Length of time without support:** In a quarter of cases support was refused because of the length of time the applicant had been without support. This does not take into account the fact that circumstances change. The changes of circumstance outlined in applications were credible and compelling in many instances; for example, the birth of a child meaning friends no longer have enough space to accommodate.

**Applicant credibility:** In almost a third of cases, the UKBA caseworker questioned the truth of the appellant’s account. In one case, the applicant had made an error on the date they last entered the UK and this was said to be an indication that she was not truly destitute. This woman had just given birth, her baby was in neonatal intensive care and she had provided evidence from the friend who had been supporting her that she was not able to support the baby once the child was discharged from hospital. The UKBA also disputed destitution since the hospital could not give a definite date for discharge, so it argued that it might not be within the 14 day period. Her appeal was allowed.

**Insufficient evidence:** In over half of the cases surveyed, the UKBA said that there was insufficient evidence of destitution provided with the application. However, in most of the cases where lack of evidence was cited, the evidence that had actually been submitted was not considered or UKBA policies not followed. In one case, despite UKBA guidance stating that caseworkers should have particular regard to applications made within the ‘grace period’ of 21 days, one person was refused because they had failed to provide sufficient evidence of how they had supported themselves for the eight days between Section 95 support being discontinued and applying for Section 4 support.

This should also be considered in the light of UKBA guidance on what evidence should be supplied with the ASF1 form. ASAP welcomes the improvement in the guidance since our last report; in particular, guidance on the assets sections asks people to send “relevant documentation”. However, the timeframe for evidence is still stated as the last six months only, when many applicants were refused because they did not provide evidence going back longer. Furthermore, on the application form it is only at question 28 where applicants are told they can provide a supporting letter.

**Family ties:** 10% were refused because the UKBA did not believe that family could not continue supporting the applicant. For example, an applicant and her baby had been living with her husband in his private rented accommodation in breach of the tenancy agreement. He was trying to support the three of them on £40 a week, which was so unsustainable that the family had no option but to apply for support.

**Other factors:** There were cases where the refusal letter did not consider the information given in the application form or the response to a further information request which had clearly addressed the reason for refusal. For example, Mr M’s support was discontinued on the grounds that he was no longer destitute because he had been able to visit his wife and baby 120 miles away in London. Evidence had already been submitted by his representatives that his wife was in a much closer location and that she had been paying his fare from her Section 95 support payments. His appeal was successful.

## UKBA decision letters

Once a decision has been made on the application for support, the UKBA caseworker writes to the applicant setting out the decisions and reasons for it. If the application is refused then the applicant is notified of their right to appeal.

The common problems with drafting and structure of letters that were identified in our ‘No Credibility’ report persisted in this later sample. Very few contained headings that referred to each of the Section 4 criteria – a structure that helps the applicant or their adviser understand which aspects have been considered and on what grounds the application was refused.

Most letters did not relate the decision to the legal test for destitution or the evidence supplied in applications. As a result it was difficult to tell which factors had informed the UKBA decision. Thirteen children were listed as dependants on the applications for support and, like the cases analysed in the ‘No Credibility’ report, not one refusal letter contained an explanation of how the decision was consistent with the UKBA’s statutory duty to safeguard and promote the welfare of children under Section 55 of the Borders, Citizenship and Immigration Act 2009.

## Delays

The speed with which applications are processed by the UKBA should depend on an applicant’s vulnerability. Given what is at stake they should all be processed within a matter of days. In many instances, however, there were long delays in processing applications, from the date on the application to the date on the decision letter. Seventy per cent of applicants had to wait more than two weeks for a decision; this is an increase of 14% since the previous report. Of these, 55% waited between two and eight weeks and there were 15% who had to wait between nine and 21 weeks.

**Case example: Mr D, an applicant who was a victim of torture and blind in one eye, waited about four months for a decision on his support application. His situation was precarious, staying in one room with a friend and his pregnant wife, without sufficient funds for his essential living needs. His appeal was allowed.**

**Case example: Mr W waited 53 days between applying for Section 4 support and his appeal hearing because the UKBA withdrew and remade decisions refusing him support, finding him not destitute, despite being verified as street homeless by the charity St Mungo’s. His vulnerabilities were highlighted in his application but had not been addressed by the UKBA: he had mental health problems and was traumatised, having recently learned of the murder of his wife and two small children. His appeal was allowed.**

The overwhelming majority of delays in the files analysed were administrative, in that they were not explainable by a particular UKBA policy. In July 2012, following a High Court decision that deliberately delaying decisions on claims for Section 4 support for a minimum of three weeks while a decision is made on the fresh claim was unlawful, the Home Office changed its policy for these types of applications.<sup>19</sup> This occurred after our sample of cases was analysed. It may be that the situation has improved but ASAP is aware that substantial delays are still occurring.

## The application form

The new ASF1 form<sup>20</sup> is difficult to complete and in many respects compares unfavourably with the previous form. The ASF1 form was introduced in 2011<sup>21</sup> and combines the application for Section 95 and Section 4 support in one form.

Based on recommendations from ASAP’s ‘No Credibility’ report there are two positive improvements on the form. There is now a full page for an applicant to write freely and give more details relevant to their application and circumstances, and a specific section allows applicants to highlight vulnerabilities that should be taken into account. Applicants have made full use of this space to explain their circumstances in depth. However, there is no indication that information from either section is taken into account.

Importantly, the form has become significantly longer and the guidance lacks clarity. Advice and assistance with the form is therefore essential for applicants.

### Length and accessibility

The length of the form is a significant issue. It is twice as long as the previous form, with 91 questions for Section 95 and a further 20 questions for Section 4, plus 22 annexes. On its website the UKBA recommends that four and a half hours<sup>22</sup> are needed to complete the form.

The ASF1 form and guidance notes are only available in English. However, 19 appellants required an interpreter during their appeal hearing. The length and language barriers mean that applicants need assistance with completing the form, but evidence shows that availability of assistance is decreasing (see below).

These factors limit the ability of applicants to effectively complete the application.

### Lack of clarity on current circumstances

There is too much focus on what assets may be available and not enough focus on the needs and current circumstances of the applicant. For example, section 6 of the form, on financial details, covers six pages, but in practice has little relevance for applicants’ circumstances. Only two of the applicants in our sample completed a single question from section 6, as they possessed empty bank accounts. Since all applicants have no recourse to public funds, none answered question 55, which covers two and a half pages and lists public benefits. There are further irrelevant questions such as asking applicants if they have an Oyster card. The same thoroughness is lacking in assessing applicants’ needs.

### When evidence is required

There is a big discrepancy between evidence requested on the form and evidence expected by decision makers. It is clearly stated in the guidance notes that applicants must supply information for the last six months.<sup>23</sup> All applications were completed in accordance with the guidelines, and all accounted

<sup>20</sup> [www.tinyurl.com/bog25dg](http://www.tinyurl.com/bog25dg)

<sup>21</sup> Our sample is split between the old and new forms. The section considers only the new ASF1 form, which was used in nine applications from our sample. The application form was missing from three files. The old form was previously reviewed in ‘No Credibility: UKBA decision making and Section 4 support’ (April 2011), p10.

<sup>22</sup> [www.tinyurl.com/cpf2he2](http://www.tinyurl.com/cpf2he2)

<sup>23</sup> ASF1 guidance notes (version 6) p4

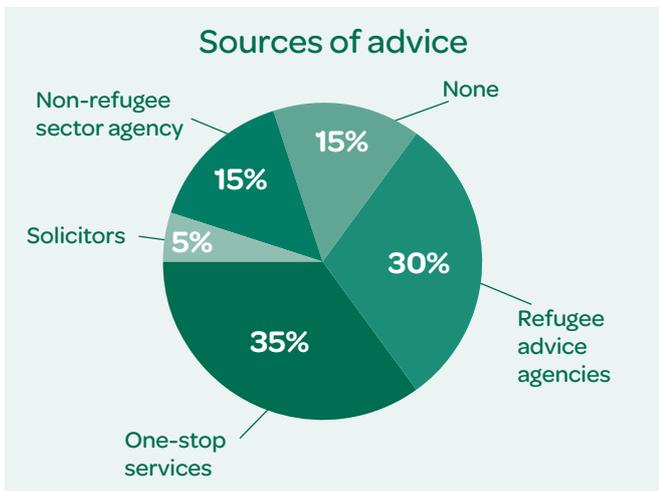
for a period longer than six months, but rejection letters had a clear expectation that applicants must account for their whole time in the UK. Annexes D and E ask for descriptions of support available from friends and family, but neither the form nor the guidance notes ask for any letters of support or evidence. But it is evident from decision letters that this is expected.

The guidance notes<sup>24</sup> have not been adequately proofread and may lead to confusion. There are particular problems with the section about Section 4 support in the guidance. The ‘question’ and ‘part’ numbers do not correlate with the ASF1 form. Significantly, the guidance explains the criteria for Section 4 eligibility twice, but each time provides different and contradictory information of evidence required.<sup>25</sup>

**Assistance in completing applications**

Eighty five per cent of applicants received help and advice with their applications, which is a smaller proportion than previously. The largest proportion of help was still provided by one-stop services.<sup>26</sup> Significantly, the assistance provided by one-stop services is down from the period covered by the April 2011 report<sup>27</sup> as major government cuts to these services have taken effect. Another significant change is that some help was now being provided by agencies outside the asylum and refugee sector. Some of the remaining gap in advice created by cuts to one-stop services has been plugged by other refugee agencies but some applicants have received no advice: 15% had no assistance at all in making their application for support.

**Role of representation in appeals**



Between April 2010 and March 2012, 59% of appeals that ASAP represented were allowed. A further 10% were either remitted or the UKBA withdrew its decision shortly before the appeal. Asylum support cases can involve complex issues of law and procedure and the factual backgrounds are often difficult. Without representation, someone with a language barrier, little knowledge of the law and is often vulnerable or frightened, will clearly have difficulty making their case for support.

Appeals could have been prevented if the UKBA had requested

the further information that was then in front of the tribunal judge (as the judge makes a request for certain information in a directions notice) or expanded the ASF1 application form guidance to include more detail about what types of evidence should be submitted. Although appeals do allow the tribunal judge to ask the clients questions and assess their credibility, which is key to decisions on destitution, it is the poor quality of decision making that leads to so many unnecessary appeals and 80% of decisions on destitution grounds still being overturned on appeal.<sup>28</sup>

<sup>24</sup> [www.tinyurl.com/bog25dg](http://www.tinyurl.com/bog25dg)

<sup>25</sup> This section is found on pages 12–16 of the ASF1 guidance notes. Information on evidence for ‘Reasonable steps to leave the UK’ is particularly confusing.

<sup>26</sup> These are provided by the Asylum Support Partnership, which comprises Refugee Council, Refugee Action, North of England Refugee Service, Scottish Refugee Council and Welsh Refugee Council.

<sup>27</sup> ASAP’s ‘No Credibility: UKBA decision making and Section 4 support’ (April 2011) p10

<sup>28</sup> In a further three cases surveyed, destitution was not actually considered at appeal because the appeal failed on another criteria for support.

# Conclusions and recommendations

## Key conclusions

- There is still an unusually high success rate at the tribunal where the refusal is on grounds of destitution. Of the files surveyed **80% were overturned on appeal**. This represents a slight improvement on the rate in our ‘No Credibility’ report. It should be noted that in a further 15% of the appeals the tribunal judge did not need to make a finding on destitution since the applicant was ineligible on another ground.
- The decision letters demonstrated that UKBA caseworkers are still **failing to apply the correct legal test** for destitution. Only one letter explained the destitution test correctly (a slight improvement as not a single letter had done so in the sample used for the last report); 10% attempted an explanation of the destitution test which was not correct; 85% did not attempt to explain the test. Most letters simply concluded that the applicant was not destitute.
- Caseworkers are still not dealing with the evidence supplied in a satisfactory way. Only four decision letters acknowledged the applicant’s circumstances and all the evidence they had supplied. In the remaining cases, the UKBA ignored all or some of the evidence supplied, instead stating that there was a lack of evidence to support destitution (while not acknowledging the evidence that had been provided) or focused on unconnected factors to assess and refuse the application. **In 45% of cases the decision letter did not take into account the evidence provided at all.**
- There were still **long delays in processing applications**: 70% of applicants had to wait for more than two weeks for a decision, an increase on the previous report; 15% had to wait over nine weeks. The longest delay was four months.

The UKBA has implemented some of ASAP’s recommendations in our ‘No Credibility’ report. In particular, the guidance to the new combined ASF1 form is clearer about what evidence is required to prove destitution and the form now allows applicants space to give details of their circumstances and highlight any vulnerabilities. A deadline of five days (two days in priority cases) has also been introduced in response to the High Court’s ruling in *MK and AH [2012] EWHC 1896 (Admin)*. However, these changes have not led to a significant improvement in decision making.

In addition:

- There is a big discrepancy between the evidence requested on the form and the evidence expected by UKBA decision makers. The guidance notes clearly state that applicants must supply information going back six months. All applications in the survey were completed in accordance with this guidance, but the rejection letters expected them to account for their whole time in the UK.
- The guidance notes to the form have not been updated to reflect the changes to the Section 4 policy instruction and still refer to the unlawful policy overturned in *MK and AH*.

## Recommendations

- The UKBA should improve training for caseworkers so they understand and apply the legal test for destitution, assess applications for support in a way which is balanced and credible, and write clear, non-judgmental decision letters.
- Case owners should be instructed to take into account all evidence supplied with the ASF1 form.
- Standard form decision letters and guidance to case owners should be improved to reflect the problems highlighted in this report.
- All decision letters should set out how the welfare of dependent children has been safeguarded and promoted in the decision making process.

# Annex

## Appeal Outcomes First-tier Tribunal (Asylum Support) 2011–2012

Outcome of all appeals, September 2011–February 2012 (Source: Tribunal User Group Statistics)

Outcome	Oral hearings	Paper appeals	Total	% of total determinations
Allowed	120	17	137	35%
Remitted	31	5	36	9%
Dismissed	174	34	208	53%
Struck out	1	9	10	3%
Total no of appeal determinations <sup>29</sup>	326	65	391	

Outcome of appeals represented by ASAP, 31 March 2011–1 April 2012 (Source: ASAP)

Subject	Allowed	Remitted	Dismissed	Other <sup>30</sup>	Total	% allowed/remitted
<b>Section 95</b>						
S95 not destitute	15	1	2	2	20	80%
S95 not an asylum seeker	6	4	1	0	11	64%
S95 breach of conditions	3	1	1	0	5	80%
S95 other or combination	3	0	0	0	3	100%
<b>Section 4</b>						
S4 not destitute	48	1	8	1	58	84%
S4 not a failed asylum seeker	3	1	1	0	5	80%
S4 not a dependant	1	0	2	0	3	33.3%
S4 not taking steps to return	32	8	25	0	68	59%
S4 breach of conditions	6	1	2	2	11	64%
S4 able to travel	22	13	10	1	46	76.1%
S4 fresh claim refused	13	1	7	1	22	64%
S4 no record of outstanding representations	41	8	38	6	93	53%
S4 other or combination	36	12	30	4	82	59%
<b>Total</b>	<b>229</b>	<b>51</b>	<b>127</b>	<b>17</b>	<b>427</b>	<b>66%</b>

<sup>29</sup> Not including appeals where there is no determination, eg. because the appeal is withdrawn (by the UKBA or by the appellant) or is invalid.

<sup>30</sup> Withdrawals by either party and adjournments.